

DATE: November 20, 1998

TO: Nursing Homes

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NH 34

FROM: Judy Fryback, Director
Bureau of Quality Assurance

Supersedes 91-007

Smoking in Nursing Homes

Recently we have received questions regarding smoking in federally certified and state-licensed nursing homes. There are several scenarios that may occur in relation to smoking in a nursing home. We will outline these below, along with our expectations for compliance with resident rights.

- **Facility has no policy prohibiting smoking and there are no city/county ordinances that prohibit smoking.** The Wisconsin Clean Indoor Air Act (section 101.123, Wis. Stats.) prohibits smoking in all *inpatient health care facilities*. "Inpatient health care facilities" includes nursing homes. However, section 101.123(4)(a)1, Wis. Stats., notes that a person may smoke in an inpatient health care facility if a person in charge, or his or her agent, designates smoking area(s) in the facility. If this occurs, the person in charge may not designate the entire facility as a smoking area. This permission to designate a smoking area does not apply if a "fire marshal, law, ordinance or resolution prohibits smoking."

Section 101.123(5), Wis. Stats., requires either the person in charge or his or her agent to post signs identifying designated smoking areas and to arrange seating to accommodate nonsmokers.

- **Facility policy allows smoking in designated areas but a local unit of government passes an ordinance or resolution prohibiting smoking.** If a local unit of government, such as the fire marshal or city/county board, passes an ordinance or resolution prohibiting smoking, smoking is prohibited in the facility beginning with the effective date of the ordinance or resolution. When a change in law or in facility policies governing resident conduct occur, federal and state nursing home regulations require the nursing home to give oral and written notice of the change to the resident or legal representative, in a language the resident or legal representative understands. [These regulations are 42 CFR 483.10(b)(1), HFS 132.31(1)(d)1 intro and HFS 132.31(1)(d)1.h., Wisconsin Administrative Code.] The federal regulation also requires the nursing home to obtain written confirmation from each resident or legal representative acknowledging his/her receipt of the notice of a change in rules and regulations governing resident conduct and responsibilities.

Residents retain the right to smoke outside the building. We will address our expectations for smoking outside the building later in this memo.

- **Nursing home changes its policy and becomes a non- smoking facility.** If a nursing home changes its past policy by implementing a policy that prohibits smoking in the building, this must be clearly designated in the facility's admission agreement. Residents who are admitted on or after the effective date of the policy may not smoke in the facility. Residents who were admitted at a time when smoking in the facility was allowed must continue to be allowed to smoke, either in the facility or in an easily-accessed adjacent area that is protected from the weather. The area or areas must protect non-smokers from the potential hazards of second-hand smoke. In addition, as outlined above, the facility must notify all residents of the change in policy affecting resident behavior and conduct.

As noted above, section 101.123(5), Wis. Stats., requires the person in charge or his or her agent to post signs identifying designated smoking areas.

- **Smoking outdoors.** Residents who are not permitted to smoke inside the building (because of city or county ordinance or because they were admitted after the facility adopted a smoke-free policy) must be permitted to smoke outside the building. This is in keeping with the federal regulation at 42 CFR 483.15(b)(3) which states, “the resident has the right to make choices about aspects of his or her life in the facility that are significant to the resident.” This means that residents who live on a unit from which they are not permitted to leave (e.g., a locked unit or an Alzheimer’s unit) still retain the right to smoke. It would be a violation of resident rights to prohibit residents from smoking altogether because they cannot leave the unit and thus have no place to smoke.

In a similar manner, it would be difficult to adopt a no-smoking policy on a unit-by-unit basis. Residents are residents of “the facility,” not the unit. As long as “grandfathered” residents on one unit are allowed to smoke, “grandfathered” residents on other units must be allowed to smoke, particularly if residents usually do not leave the unit. If a resident transfers from one unit to another unit of the facility, his or her status as a current resident does not change.

To assure that the rights of all residents - smokers and non-smokers alike - are protected, facilities may need to be creative when developing or designating acceptable smoking areas. For any nursing home considering becoming a non-smoking facility, we would like to reiterate the advice that we gave in BQC-91-007 (January 30, 1991). In that memo, we noted that while “we are all keenly aware of the dangers of smoking we also recognize that many residents have smoked for years...and depriving them of the opportunity to smoke could be counterproductive to their welfare. We encourage consideration of the residents’ rights issues and accommodations for those who wish to smoke, and strongly urge that prior to implementation of total smoking restriction in your facility, the psychological and social impact upon your residents be carefully reviewed.”

If you have additional questions, please contact the Regional Field Operations Director assigned to your facility. The names and phone numbers of the Regional Field Operations Directors are listed below.

Northeastern/Green Bay Regional Office:	Pat Benesh	920-448-5249
Northern/Rhineland Regional Office:	Marianne Missfeldt	715-365-2802
Southeastern/Milwaukee Regional Office:	Tony Oberbrunner	414-227-4908
Southern/Madison Regional Office:	Phyllis Tschumper	608-243-2374
Western/Eau Claire Regional Office:	Joe Bronner	715-836-4753